DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

WASHINGTON, D.C.

JOHN R. FEORE, JR.
DIRECT DIAL 202-776-2786
jfeore@dlalaw.com

1200 NEW HAMPSHIRE AVENUE, N.W. • SUITE 800 • WASHINGTON, D.C. 20036-6802
TELEPHONE 202-776-2000 • FACSIMILE 202-776-2222

ONE RAVINIA DRIVE • SUITE 1600
ATLANTA, GEORGIA 30346-2108
TELEPHONE 770-901-8800
FACSIMILE 770-901-8874

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: Supplement to the Record Concerning Retention of the UHF Discount
Biennial Review of Broadcast Ownership Regulations
MB Docket No. 02-277

Dear Ms. Dortch:

Paxson Communications Corporation ("PCC"), by its attorneys, and pursuant to Section 1.1206 of the Commission's rules, hereby submits this written *ex parte* presentation to aid the Commission in its review of the UHF Discount as part of its omnibus *2002 Biennial Review* of its broadcast ownership rules.[1] PCC wishes to take this opportunity to emphasize that there is not a shred of evidence in the record that would support modification or repeal of the UHF Discount. Indeed, all the evidence currently before the Commission illustrates the continuing need for the UHF Discount. The Commission affirmed the UHF Discount in June, 2000, pursuant to a comprehensive record, and any action to repeal or modify the rule without clear, compelling, and substantial evidence would be arbitrary and capricious. Moreover, the wholesale re-regulation of UHF broadcasters would be inconsistent with the Commission's responsibility under Section 202(h) to eliminate burdensome regulations that disserve competition and the public interest. Accordingly, the Commission must reaffirm that the UHF Discount remains necessary for the remainder of the DTV transition and possibly beyond.

No Evidence in This Proceeding Supports Modification or Repeal of the UHF Discount.

Less than three years ago, in its *1998 Biennial Review*, the Commission found that the UHF Discount remains "necessary in the public interest" to equalize the competitive positions of

[1] *See* 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277; Cross-Ownership of Broadcast Stations and Newspapers, MM Docket No. 01-235; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, 17 FCC Rcd 18503 (2002) (the "*2002 Biennial Review*").

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UHF and VHF broadcasters.[2] The Commission based this conclusion on two important findings: first, that insurmountable technical limitations prevent UHF stations from reaching as great a number of over-the-air viewers and cable headends with a quality signal; and, second, that higher operating expenses for UHF stations place them at a competitive disadvantage.[3]

The three commenters in this proceeding that have questioned the continuing validity of the UHF Discount have presented no evidence that undermines either the Commission's findings or its conclusion. Instead, they offer only conclusory statements that the UHF Discount should be eliminated. A consortium of children's groups, for example, states that the Commission "should eliminate the UHF Discount, which overcompensates UHF station owners,"[4] but provides no evidence or explanation to support its contention. Similarly, Westwind Communications, LCC states in its Reply Comments that the Commission should eliminate the "anachronistic" UHF Discount without disclosing how a rule reaffirmed by the Commission less than three years ago became outdated so quickly.[5] The only party to offer more than a sentence against retention of the UHF Discount – the United Church of Christ – offers only past Commission pronouncements regarding the slight amelioration of the UHF handicap.[6] As PCC explained in its Reply Comments, these statements were before the Commission when it most recently retained the UHF and cannot form the basis for repealing it now.

These three comments together with a recent ex parte filing provide the entire record in favor of repealing or modifying the UHF Discount that has been developed in this proceeding and cannot support any Commission action, let alone the repeal of a rule that was so recently reaffirmed. Indeed, without substantial evidence of significantly changed circumstances over the past three years, it would be difficult to produce the reasoned explanation that a reviewing court would require for modification of the UHF Discount at this time.[7] Given its record defending its ownership decisions in court, the Commission must be wary of making sweeping changes without sufficient record evidence to support its decisions. That is particularly the case where, as here, important public benefits continue to flow from the UHF Discount.

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[2] 1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Biennial Review Report*, 15 FCC Rcd 11058, 11078 ("*1998 Biennial Review*").

[3] *See id.*

[4] Comments of Children Now, *et al* at 3.

[5] Reply Comments of Westwind Communications, LLC at 3

[6] *See* Comments of the Office of Communications, Inc. of the United Church of Christ, *et al* at 56-58.

[7] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) (reasoned opinion beyond that necessary to refrain from adopting a rule is required to discard a rule); *Office of Communication of United Church of Christ v. FCC*, 560 F.2d 529, 532 (2d Cir. 1977); *National Wildlife Foundation v. Mosbacher*, 1989 U.S. Dist. Lexis 9748 (D.D.C. 1989) (overturning agency order amending two-year old rule without reasoned explanation).

The Commission Has Received Substantial Evidence that the UHF Discount Remains Necessary in the Public Interest.

At the same time, proponents of the UHF Discount, including PCC, Univision, Granite Broadcasting ("Granite"), and the National Association of Broadcasters ("NAB"), have presented ample evidence in favor of retaining the UHF Discount. In a recent *ex parte* filing, Capitol Broadcasting Company, Inc. ("Capitol") complains that there has been insufficient discussion of the UHF Discount.[8] To the contrary, there has been considerable discussion of the UHF Discount – but nearly all of it indicates that the UHF Discount must be retained.

Univision, for example, provided significant evidence that the UHF Discount helps enable it to reach minority households in many of its markets, which tend to have low cable subscribership.[9] Univision also provided evidence that the activation of new DTV stations is creating additional interference to analog UHF stations with the accompanying loss of service.[10] As the Commission is aware, PCC's UHF station KSPX(TV), Sacramento, California, also has experienced unpredicted interference from a DTV station. This unexpected interference experienced by KSPX and other stations plainly refutes any suggestion that the DTV transition itself is ameliorating the competitive disparity between VHF and UHF stations or that eliminating the UHF Discount prior to the close of the DTV transition would be prudent policy.

This new evidence must be considered in addition to the comprehensive evidence presented by PCC and NAB in the *1998 Biennial Review* proceeding. PCC has attached to this letter two studies presented by NAB as well as portions of PCC's Comments and Reply Comments in the *1998 Biennial Review* to ensure that the Commission still has this information in mind as it considers the UHF Discount.[11] Taken together these materials continue to conclusively demonstrate:

- that UHF signals are technically inferior of VHF signals;
- that UHF signals are unable to reach over-the-air audiences comparable to those of VHF stations;
- that UHF stations do not gain cable carriage comparable to VHF stations;
- that UHF stations do not receive ratings as high as those of VHF stations;
- and that consequently, UHF stations are not as financially successful as their VHF competitors;

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8 *See* Written *Ex Parte* Notice of Capitol Broadcasting Company, Inc. at 1 ("*Capitol Ex Parte*").

9 *See* Univision Reply Comments at 6-7.

10 *See id.* at 10-11.

11 *See* Attachments A-D.

These facts supported by this evidence formed the basis for the Commission's decision in the *1998 Biennial Review*. As Granite demonstrates in its Reply Comments, none of these facts have changed, and the Commission consequently has no basis for reversing its decision.[12]

Moreover, the evidence provided in the *1998 Biennial Review* and in this proceeding disprove Capitol's assertion that the UHF Discount "result[s] in our current 35% cap actually being a 70% cap . . ."[13] In the analog world, UHF stations simply do not have the ability to reach anything approaching every household in their DMAs, even when cable carriage is considered. PCC presented evidence showing that in some cases, its stations covered as little as 27% of the area covered by VHF stations in the same market, and, in one case, could obtain cable carriage of only 4 of the 29 counties in the station's DMA.[14] Because cable carriage is based on a station's ability to deliver a quality signal to a sometimes distant headend, it is not surprising that UHF stations would be unable to garner the same level of cable carriage as their VHF counterparts. These types of disparities continue to exist and, with the additional DTV-generated interference noted by Univision and PCC, will only be made worse as additional DTV stations commence full power operations.

The persistence of all these physical and economic handicaps serve to confirm the wisdom of the Commission's retention of the UHF Discount in the *1998 Biennial Review*. Counting each UHF station as reaching only 50% of the households in its DMA allows station-group operators like PCC and Univision to use the UHF Discount to acquire and operate stations that otherwise might fail, enabling them to serve niche audiences that are frankly underserved by the Big Four networks. Rather than seeking ways to curtail UHF broadcasting by eliminating the Discount, the Commission should be seeking ways to encourage this type of service to the public.

<u>It Is Far Too Early for the Commission to Conclude that the DTV Transition Will Render the UHF Discount Obsolete.</u>

The Commission also found in the *1998 Biennial Review* that completion of the DTV transition might make it appropriate to modify or eliminate the UHF Discount.[15] Accordingly, the Commission indicated that it would conduct a rulemaking to examine the Discount's future near the close of the DTV transition.[16] As PCC indicated in its Comments, the DTV transition has not progressed sufficiently to determine whether the Commission's predictions will be accurate. As described above, Univision has persuasively demonstrated that the transition itself is harming analog UHF broadcasters' ability to serve their viewers, and that such harm is likely

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[12] *See* Granite Reply Comments at 6.

[13] *See* Capitol *Ex Parte* at 1.

[14] *See* PCC Comments in MM Docket No. 98-35, filed July 21,1998 at 7; PCC Reply Comments in MM Docket No. 98-35, filed August 21, 1998 at 5-7.

[15] *See 1998 Biennial Review*, 15 FCC Rcd 11058 11079-80.

[16] *See id.*

to increase as the transition progresses. Accordingly, eliminating the UHF Discount now based on the possibility of future obsolescence would be a grave error based on unsubstantiated speculation.

The Commission cannot yet be certain that the UHF Discount will not be needed in the post-transition world. Although the Commission properly has noted that UHF broadcasters' ability to maximize their service area could be an equalizer between UHF and VHF stations,[17] the Commission should be equally aware that its decision to base its initial DTV Table of Allotments on a principle of replication of service has locked in the signal-coverage disparities of the analog world. For example, in the Seattle market, PCC station KWPX-DT currently is licensed with 175kW ERP, while ABC affiliate KOMO-DT operates at 810 kW. Likewise, in the Washington, D.C. area, PCC station WPXW-DT is licensed at a power of 90 kW, while ABC affiliate WJLA-DT is licensed at 646 kW. As a consequence , PCC reaches 30% fewer Washington area viewers – or nearly 1,000,000 fewer viewers – than WJLA-DT. If these types of disparities remain widespread in the digital world, then some discount will be required if the Commission wishes to maintain the integrity of the over-the-air broadcast system. Thus it is simply too early to tell whether the UHF Discount will be needed in the DTV world. The Commission should follow the path laid out in the *1998 Biennial Review* and defer consideration of the rule until the post-transition world begins to take shape.

The Commission Cannot Use a Section 202(h) Review to Re-Regulate Broadcasters.

As PCC and Granite have pointed out, the Commission's responsibility under Section 202(h) of the Act is to evaluate its restrictions on broadcast ownership in the light of current levels of competition. Section 202(h) does not empower the Commission to impose new or increased restrictions through the biennial review process. Even if it did, however, the Commission still would bear a tremendous burden to show by the clear weight of the evidence that such new or increased restrictions are justified by the available evidence.

As demonstrated above, the parties advocating re-regulation of UHF broadcasters have presented no evidence to support that result. Consequently, the Commission has been given no justification for a conclusion that increased regulation of UHF broadcasters is at all warranted, let alone necessary in the public interest. It would be a perverse result indeed, if the Commission used this proceeding – intended by Congress to be a vehicle for principled deregualtion – to re-regulate a class of broadcasters without any evidence to support that effort.

Conclusion

Finally, the Commission must recognize that eliminating the UHF Discount would be flatly inconsistent with nearly all the Commission knows about UHF broadcasting. Even if the Commission could find that the 50% discount underestimates somewhat the number of households some UHF broadcasters reach, it knows even more certainly that ascribing them the same viewership as is ascribed to local VHF stations would substantially overestimate their

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[17] *See id.*

accessible audience. The Commission also knows that UHF stations already are competitively disadvantaged as compared to their VHF counterparts. Given their extensive competitive handicaps, it would be much more reasonable to err on the side of undercounting rather than overcounting UHF broadcasters' audience. Perhaps the greatest burden the Commission would bear in this entire proceeding would be to explain how it could possibly be necessary in the public interest to eliminate a rule that injures no one and contributes so much to the level of competition in the American broadcasting system. The Commission cannot meet that burden on this or any other record containing even a kernel of common sense. Accordingly, the

Commission must reaffirm its findings and conclusions in the *1998 Biennial Review* and find that the UHF Discount continues to be necessary in the public interest.

Respectfully Submitted,

John R. Feore, Jr.
Counsel for Paxson Communications Corporation

Attachments

cc w/ attachments:

Chairman Michael K. Powell
Commissioner Katherine Q. Abernathy
Commissioner Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
W. Kenneth Ferree, Chief, Media Bureau
Paul Gallant, Special Advisor, Media Ownership Working Group

ATTACHMENT

A

The "UHF Penalty" Demonstrated

Stephen E. Everett, Ph.D.

Director
Audience Measurement and Policy Research

National Association of Broadcasters

July, 1998

Introduction

Do people at home watch a UHF network affiliate less, just because it's a UHF station? The findings reported here suggest the answer is "yes" – even after considering other factors that might enter into the mix, such as a station's network and its DMA rank.

Viewing data gathered in November, 1997, by Nielsen Media Research were analyzed for all Nielsen DMAs in an effort to identify systematic differences in viewing levels between UHF and VHF network affiliates (for the four major networks). In order to minimize programming differences from station to station, only prime-time ratings were included in this analysis. The research question: after controlling for possible intervening factors such as network programming line-up and market size, do UHF affiliates generate lower prime-time ratings than do VHF affiliates, on average? As a follow-up question, are VHF/UHF ratings differences related in any way to network affiliation or market size?

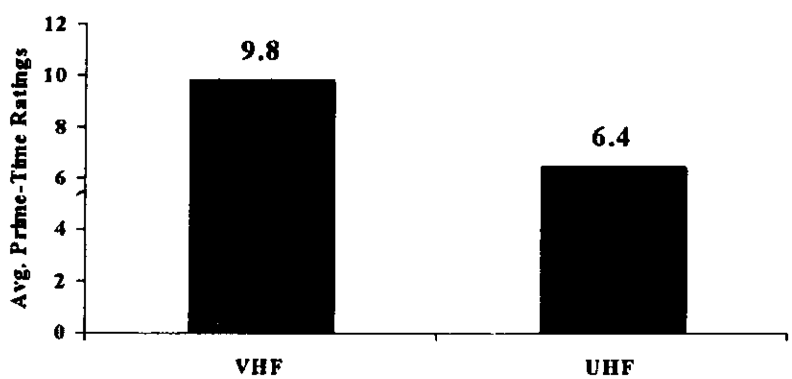
Data analysis was performed using Analysis of Variance (ANOVA).

Results

<u>VHF Affiliates Draw Higher Ratings</u>

As Figure 1 shows, the group of VHF affiliates from all markets in this analysis averaged a 9.8 prime-time rating, while UHF affiliates averaged only a 6.4 rating. This is strong evidence that the conceptual premise for the "UHF discount" remains in force and, consequently, the discount is justified.

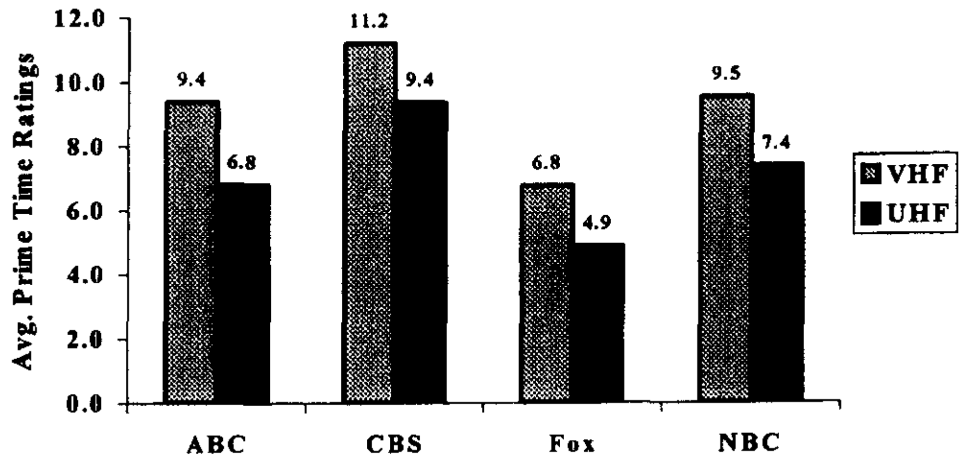
Figure 1
VHF/UHF Ratings Differences



"UHF Penalty" Worse for Some Networks

Figure 2 shows that the difference between VHF and UHF affiliates' average prime-time ratings is more pronounced for ABC and NBC affiliates than for CBS and Fox.[1]

Figure 2
Interaction Between VHF/UHF Status and Network Affiliation



When the mean ratings are adjusted through ANOVA for market size differences and the overall VHF/UHF difference, this result is even more pronounced:

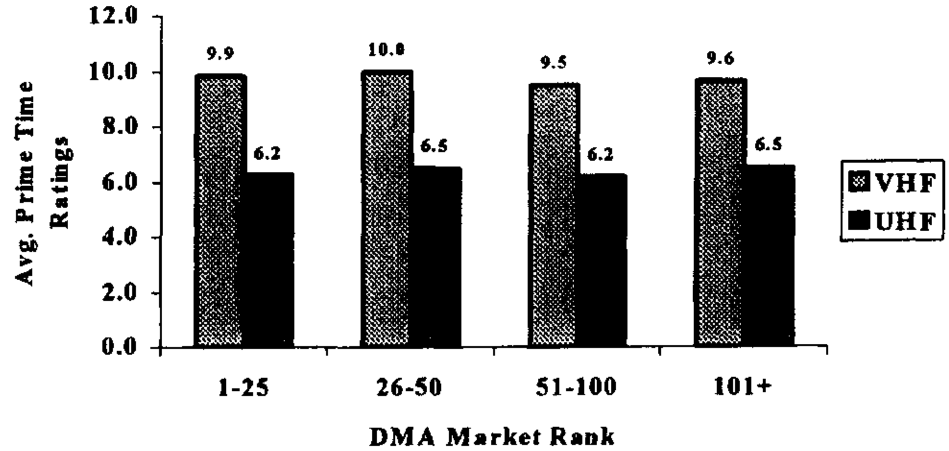
Affiliation	V/U Difference
ABC	3.1
NBC	3.6
CBS	1.2
Fox	1.0

[1] The average rating shown for each network is the unweighted mean of average ratings of affiliates for all DMAs (one average rating per affiliate in each DMA). As such, large and small markets have equal influence upon the national averages. Therefore these averages may not reflect the relative positions of the networks as commonly reported.

"UHF Penalty" Present Across All Market Sizes

As shown in Figure 3, the difference between VHF and UHF affiliates' prime-time ratings exists for all four market groups analyzed in this study. There are only very slight differences in the magnitude of these "UHF penalties" from market group to market group.

Figure 3
Interaction Between VHF/UHF Status and Market Size



Conclusion

The "UHF Penalty" apparently continues to exist. When we account for the statistical effects of market size and network affiliation – two factors reasonably expected to be related to prime-time ratings from station to station – strong evidence emerges to continue to support the notion that UHF affiliates draw lower ratings because they are UHF stations.

This "UHF Penalty" shows up across markets of different sizes and for all four networks. However, the penalty is greater for ABC and NBC affiliates. Perhaps the station affiliation changes between CBS and Fox in recent times, in which Fox picked up numerous new VHF affiliates while CBS signed new deals with UHF affiliates, is responsible for diluting the difference somewhat for these two networks. The difference still is there, however.

ATTACHMENT

B

A FINANCIAL ANALYSIS OF THE UHF HANDICAP

Mark R. Fratrik, Ph.D.
Vice President/Economist
Research and Planning Department
National Association of Broadcasters
July 1998

A FINANCIAL ANALYSIS OF THE UHF HANDICAP

Introduction and Overview of Study

Within the television industry there is a noticeable distinction between those stations on the VHF and UHF bands. Due to technical properties, the coverage patterns of VHF stations generally are much larger than UHF stations. For a given service area, UHF stations have to use more power, thereby increasing their operating costs compared to VHF stations.

Given their inherent coverage disadvantages, UHF stations tend to attract smaller audiences than for their VHF counterparts, for the same programming.[1] With these smaller audiences, it easily follows that advertising revenues, pre-tax profits, and cash flows should be lower than comparative VHF stations. Of course, there are exceptions to this general conclusion, but we would expect to see a generally worse financial profile of UHF stations as compared to their VHF cohorts.

In this report we examine that hypothesis. Using data collected by NAB, Broadcast Cable Financial Management Association (BCFM), and Price Waterhouse, we can evaluate the past four years worth of data to determine whether UHF stations face a financial disadvantage.[2] These data are from an annual survey of all commercial television stations that attracts nearly a 70% response rate providing a reliable picture of the financial situation faced by commercial television stations.

To try and focus in on the impact of the UHF disadvantage we only examine affiliates of the four major networks – ABC, CBS, Fox, and NBC. By only looking at these stations we can compare stations with identical, or near-identical prime-time programming (assuming they clear a similar amount of their network programming). Comparisons are presented on a national historical basis for the years 1993-1996, by market size (Nielsen DMA) and affiliation type for the most recent year that data are available, 1996.

National Comparison

In Figure 1 we present the comparisons of all affiliates from the four major networks for the years 1993 through 1996. Three station's variables are compared – net revenues, pre-tax profits and cash flows. The averages for these two groups of stations are compared to generate the reported percentage.

The relative performance of UHF affiliates has improved in the four years shown, though they still suffer from a noticeable disadvantage, with the average UHF affiliate generating less than 50% of average VHF affiliate revenues, slightly more than a third of the cash flow and less than a quarter of the pre-tax profits.

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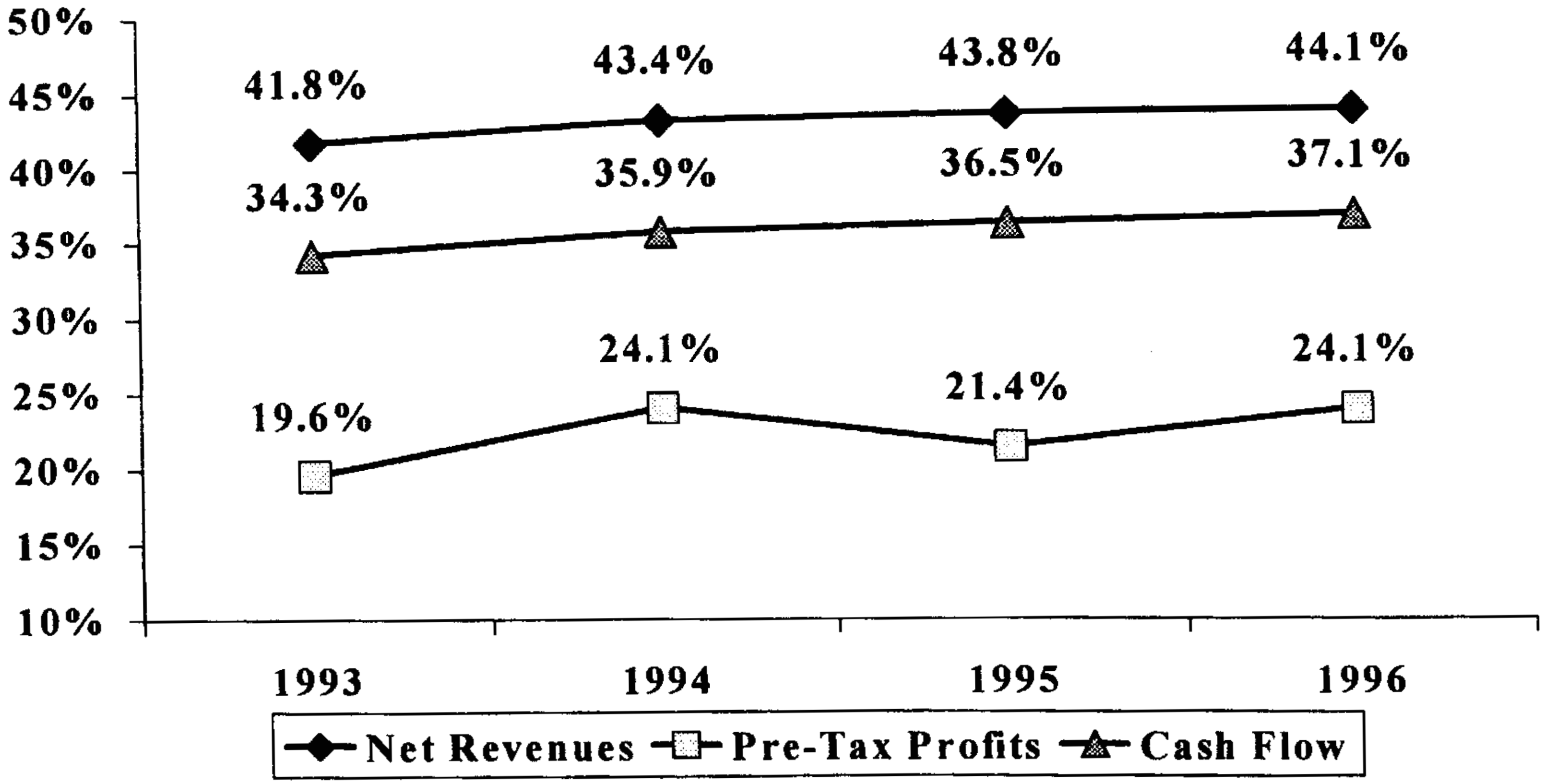
1 See S. Everett, "The 'UHF Penalty' Demonstrated," Appendix C, Comments of the National Association of Broadcasters, in MM Docket 98-35.

2 Unfortunately, the data from previous years (before 1993) are not available for easy analysis.

Figure 1
UHF Affiliates* Performance as a Percentage of VHF Affiliates*



* Includes ABC, CBS, Fox & NBC affiliates

Source: 1994 - 1997 NAB/BCFM Television Financial Surveys.

Market Size Comparison

This disadvantage is evident when examined on a market size basis. Figure 2 shows the same comparative values for four market size groupings for 1996. What is particularly noticeable is that the disadvantage becomes less pronounced when you examine the smaller markets. In fact, in the smallest markets, DMA rankings 101 and above, the UHF affiliate generates only 20.3% less in revenues, 30.0% less in cash flow, and 32.7% less in pre-tax profits.

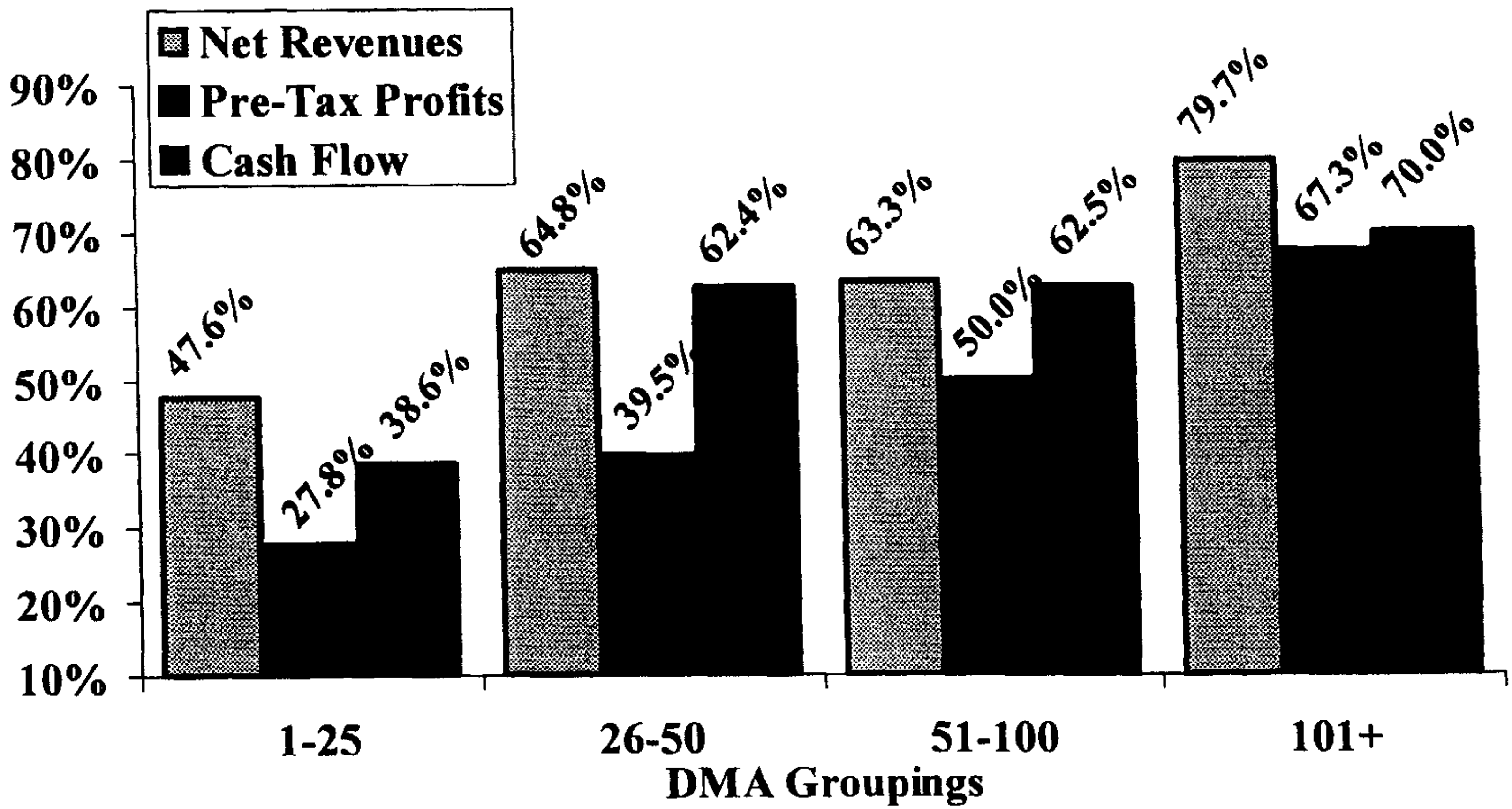
Affiliate Type Comparison

The final comparison is with the different affiliate types. Figure 3 shows the comparative values for the four major affiliate types for 1996. All comparisons reinforce the UHF disadvantage, though to vastly different degrees. In fact, the average UHF CBS affiliate actually generated a loss while the average VHF affiliate generated positive pre-tax profits. On the other hand, the average UHF CBS affiliate came closest to their VHF counterpart in terms of net revenues, generating nearly 50% of that value.

Conclusion

By examining the relative values for UHF and VHF affiliates nationally for the past four years, by market sizes and by networks, one only can conclude that UHF stations fared worse than their VHF counterparts. While in some cases (e.g., UHF stations in the smallest markets) that poorer performance is small, in all cases by examining several financial indicators (net revenues, pre-tax profits and cash flows) UHF stations still face a disadvantage.

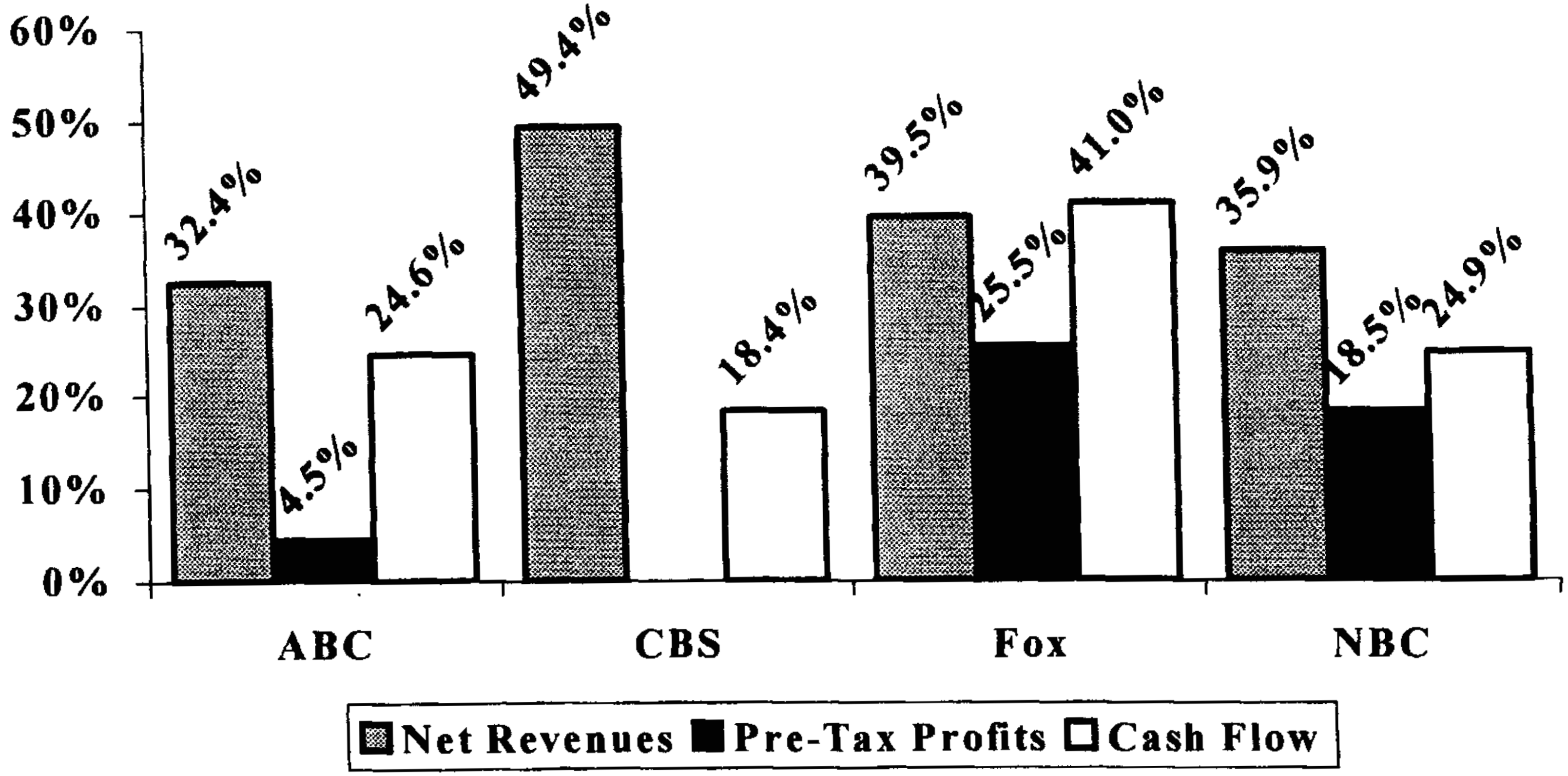
Figure 2
UHF Affiliates* Performance as a Percentage of VHF Affiliates* By Market Size in 1996



* Includes ABC, CBS, Fox & NBC affiliates

Source: 1994 - 1997 NAB/BCFM Television Financial Surveys.

Figure 3
UHF Affiliates Performance as a Percentage of VHF Affiliates By Affiliation Type in 1996



Source: 1994 - 1997 NAB/BCFM Television Financial Surveys.